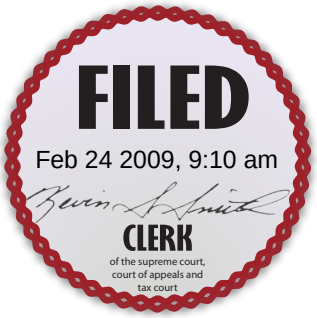

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IN THE
COURT OF APPEALS OF INDIANA

GARY T. MCGUIRE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0811-CR-678
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0502-FA-018

February 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Gary T. McGuire was a passenger in a vehicle when police officers determined that the vehicle needed to be towed. Planning to give McGuire a ride in a police patrol vehicle to another location, an officer first patted him down for weapons. During the pat-down search, the officer found cocaine in McGuire's possession. McGuire was convicted of possession of cocaine with the intent to deliver. He appeals his conviction, arguing that the trial court improperly admitted evidence discovered during the pat-down search and that the evidence is insufficient to prove that he intended to deliver cocaine to others. Concluding that the challenged evidence was properly admitted pursuant to the plain feel doctrine and that the evidence is sufficient to prove that McGuire intended to deliver cocaine, we affirm.

Facts and Procedural History

On January 31, 2005, Carmel Police Officer Jeffrey Sedberry ran a license plate check on a gray Dodge Intrepid traveling on 96th Street in Hamilton County, Indiana, and discovered that the license plate was registered to a gray Hyundai. Tr. p. 115. Therefore, Officer Sedberry initiated a traffic stop of the vehicle. *Id.* at 115-16.

Shemilah Crow, McGuire's then-girlfriend and the mother of two of his children, was the driver. McGuire sat in the passenger seat, and two young children were in the back seat. *Id.* at 116. Officer Sedberry determined that both Crow's and McGuire's driving privileges were suspended. *Id.* at 117-18. He decided to tow the vehicle because neither adult could lawfully drive it, it had an improper license plate, and Crow was unable to produce documentation of her ownership of the vehicle. *Id.* at 119.

Officer Sedberry arrested Crow for driving without a valid license but then released her with a summons to appear. Officers Timothy Byrne and Scott Long arrived to assist Officer Sedberry, and the officers decided to transport Crow, McGuire, and the children away from the scene of the stop to a safer location. *Id.* at 119-20, 134, 146-48. However, the officers observed that a police car could not transport all four individuals. State's Ex. A at 18:05:03. Officer Byrne advised McGuire of the plan to transport everyone to a safer location, and McGuire told the officer that he wished to receive a ride. Tr. p. 136-37, 148. Before inviting McGuire into his police car, Officer Byrne conducted a pat-down search of McGuire for officer safety. *Id.* at 137. During the pat-down search of the exterior of McGuire's jacket, Officer Byrne "felt a rather large, hard ball which by the feel of it [the officer] could identify as cocaine." *Id.* at 137-38. Officer Byrne removed the item from McGuire's jacket, and McGuire told him that it was baking soda. *Id.* at 138. At that point, Officer Byrne handcuffed McGuire. *Id.* The item removed from McGuire's jacket was a clear plastic bag that contained clear bags of a white substance and an off-white substance. *Id.* at 140. The bags were later determined to contain 41.53 grams of powder cocaine and 1.77 grams of crack cocaine, Court's Ex. 1 (Stipulation of Evidence), an aggregate 43.3 grams of cocaine.

The State charged McGuire with Class A felony possession of cocaine with the intent to deliver.[1] Before trial, McGuire filed a motion to suppress the evidence found pursuant to Officer Byrne's pat-down search. Appellant's App. p. 69-70. Following a

[1] Ind. Code § 35-48-4-1(a)(2)(C), (b)(1).

hearing, the trial court denied the motion. *Id.* at 8. After a jury trial, McGuire was found guilty as charged. *Id.* at 183. McGuire now appeals his conviction.

Discussion and Decision

McGuire raises two issues on appeal. First, he argues that the trial court improperly admitted evidence discovered during a pat-down search. Second, he argues that the evidence is insufficient to support his conviction.

I. Admission of Evidence

McGuire contends that the trial court erred in denying his motion to suppress the evidence discovered when Officer Byrne searched him because the search violated the "plain feel doctrine" under the Fourth Amendment.[2] Although he argues on appeal that the trial court erred in denying his motion to suppress, McGuire appeals following a completed trial. Thus, the issue on appeal is properly framed as whether the trial court abused its discretion when it admitted the challenged evidence at trial. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. Our standard of review of a trial court's determination as to the admissibility of evidence is for an abuse of discretion. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). We will reverse only if a trial court's decision is clearly against the logic and effect of the facts and circumstances. *Id.* We will not reweigh the evidence and will consider any conflicting evidence in favor of the trial court's ruling. *Collins*, 822 N.E.2d at 218.

[2] McGuire does not cite to the Fourth Amendment in his appellate brief. However, the cases to which he cites for this argument deal with the Fourth Amendment, and we therefore infer that he makes this claim under the Fourth Amendment. *See* Appellant's Br. p. 15-17. He also makes no mention of the Indiana Constitution in this section of his brief.

McGuire does not challenge the traffic stop of the vehicle in which he was a passenger. Rather, he challenges the propriety of the subsequent pat-down search under the Fourth Amendment. The Fourth Amendment to the United States Constitution, made applicable to the states by way of the Fourteenth Amendment, protects against unreasonable searches and seizures. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). It reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Generally, the Fourth Amendment prohibits warrantless searches and seizures. *Ratliff v. State*, 770 N.E.2d 807, 809 (Ind. 2002). If a search was conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. *Id*.

One exception to the warrant requirement was laid out in *Terry v. Ohio*, 392 U.S. 1 (1968), which recognized that the Fourth Amendment permits an officer to pat down an individual for weapons

> for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. . . . [T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Id. at 27. Subsequent to *Terry*, the Supreme Court held that contraband other than weapons can be properly seized during a *Terry* pat-down search. *Dickerson*, 508 U.S. at 374 (citing *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). In *Minnesota v. Dickerson*,

the Supreme Court developed what is now known as the "plain feel doctrine." Pursuant to the plain feel doctrine, "police officers may seize contraband detected through the officer's sense of touch . . . during a search of a person for weapons for the safety of the officer." *Smith v. State*, 780 N.E.2d 1214, 1216 (Ind. Ct. App. 2003), *trans. denied*. "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons . . . ." *Dickerson*, 508 U.S. at 375. In order for contraband seized without a warrant to be admissible pursuant to the plain feel doctrine, "(1) the contraband must have been detected during an initial search for weapons rather than during a further search, and (2) the identity of the item or items must have been immediately apparent to the officer." *Smith*, 780 N.E.2d at 1217 (citing *Burkett v. State*, 691 N.E.2d 1241, 1244-45 (Ind. Ct. App. 1998), *reh'g denied*, *trans. denied*).

First, we examine whether Officer Byrne, the officer who conducted the pat-down search of McGuire, was "warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Officer Byrne testified at trial that he always asks to pat down unfamiliar individuals before he allows them in his police vehicle "for [his] safety just to make sure there's no weapons or anything that could potentially harm [him]." Tr. p. 137. In *Wilson v. State*, 745 N.E.2d 789, 792 (Ind. 2001), the Indiana Supreme Court found that "when an officer places a person into a patrol car that will be occupied by the officer or other persons, there is a significantly heightened risk of substantial danger to those in the car in the event the detainee is armed." The Court further explained, "[I]t is

generally reasonable for a prudent officer to pat-down persons placed in his patrol car, even absent a belief of dangerousness particularized to the specific detainee." *Id.*

Here, while McGuire was not a detainee when Officer Byrne decided to give him a ride in the police patrol car, the same rationale applies. Officer Byrne was going to be alone with McGuire (or only otherwise with two small children) in his patrol car, and it was therefore reasonable for Officer Byrne to pat McGuire down before driving with him in the car. *Id*. We have addressed such a situation before. Following our Supreme Court's decision in *Wilson*, we examined the question of whether a police officer may pat down an individual *who is not under arrest* before allowing the individual into the officer's police vehicle. We approved the pat-down search, reasoning, "Even if [the officer] lacked a belief that [the individual] posed a risk of danger, the increased risk of placing [the individual], a potentially armed individual, into the police vehicle justified [the officer]'s pat-down search of [the individual] prior to placing him inside the police vehicle." *Lewis v. State*, 755 N.E.2d 1116, 1124 (Ind. Ct. App. 2001).

McGuire contends that he did not wish to receive a ride from Officer Byrne and that the pat-down search was therefore unnecessary as an officer safety measure. However, evidence was presented at trial that "given the hour and the temperature" at the time of the traffic stop, Officer Byrne assumed that McGuire, Crow, and the children would want rides to another location. Tr. p. 148. Officer Byrne testified that when he offered McGuire a ride, "he said he would like a ride." *Id.* McGuire "acknowledges that the initial consent given by McGuire to [Officer] Byrne to conduct the patdown of his person would require a review of the credibility of the witnesses and reweighing of the

evidence[.]" Appellant's Br. p. 18. To the extent that McGuire contends that the pat-down search was unreasonable because he did not wish to receive a ride from Officer Byrne, we decline his invitation to reweigh the evidence. Once McGuire accepted a ride in the officer's vehicle, Officer Byrne was justified in conducting a brief pat-down search pursuant to *Terry*.

Next, we examine whether "(1) the contraband [was] detected during an initial search for weapons rather than during a further search, and (2) the identity of the item or items [was] immediately apparent to the officer." *Smith*, 780 N.E.2d at 1217. There is no dispute that Officer Byrne found the cocaine during an initial search of McGuire for weapons. McGuire contends only that the identity of the cocaine was not immediately apparent to Officer Byrne. Appellant's Br. p. 16-17. However, Officer Byrne testified at trial, "As I began to pat down the exterior of [McGuire's] jacket, through the jacket I felt a rather large, hard ball which by the feel of it I could identify as cocaine." Tr. p. 137-38. He explained, "In my training and in my experience as a law enforcement officer I've come across numerous incidents where I have had a chance to feel and handle cocaine that was packaged in a Baggie." *Id.* at 139. Based on Officer Byrne's unequivocal testimony, it was immediately apparent to him that the "large, hard ball" in McGuire's pocket was contraband – cocaine. *Id.* at 137-38. We will not reweigh the evidence. We cannot say that the trial court erred in finding that the identity of the cocaine was immediately apparent to Officer Byrne.

McGuire has not established that the pat-down search exceeded the parameters of the plain feel doctrine. The trial court was within its discretion to admit the evidence discovered during the pat-down search.[3]

II. Sufficiency of the Evidence

McGuire also argues that the evidence is insufficient to support his conviction for possession of cocaine with the intent to deliver. Specifically, he contends that the evidence is insufficient to prove that he intended to deliver the cocaine to others. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 147.

In order to convict McGuire of Class A felony possession of cocaine with the intent to deliver, the State had to prove that McGuire "possesse[d], with intent to: . . . deliver . . . cocaine . . . pure or adulterated" and that the "amount of the drug involved weigh[ed] three (3) grams or more[.]" I.C. § 35-48-4-1(a)(2)(C), (b)(1). McGuire argues

[3] Because we affirm the admission of the cocaine on this ground, it is irrelevant whether McGuire consented to the search. We therefore do not reach McGuire's argument that he did not consent to being searched by Officer Byrne.

only that the evidence is insufficient to prove that he intended to deliver the cocaine to others. Circumstantial evidence of a defendant's intent to deliver cocaine is sufficient to prove that element of the offense. *Montego v. State*, 517 N.E.2d 74, 76 (Ind. 1987). Our Supreme Court has recognized that "[p]ossession of a substantial amount of narcotics constitutes circumstantial evidence of intent to deliver," and "[i]f the quantity is such that it could not be personally consumed or used, then an inference of a predisposition to sell can reasonably be drawn." *Goodner v. State*, 685 N.E.2d 1058, 1062 n.4 (Ind. 1997).

Here, McGuire possessed 43.3 grams of cocaine. Court's Ex. 1 (Stipulation of Evidence). In another case involving a significantly lesser amount of cocaine, our Supreme Court examined and rejected the defendant's claim that the evidence was insufficient to show that he intended to deal the drugs. *Goodner*, 685 N.E.2d at 1062. The Supreme Court concluded that the jury could infer the defendant's intent to deliver cocaine where the defendant possessed 8.25 grams of cocaine, a larger amount than a user would generally keep for personal use, and where the drug was packaged in separate bags. *Id.* Here, not only did McGuire possess 43.3 grams of cocaine, more than *eight times* the amount of cocaine discussed in *Goodner*, as in *Goodner*, other evidence supported the inference that he intended to deliver the cocaine. Although McGuire's argument is that the cocaine was merely for personal consumption, evidence at trial established that McGuire claimed to police that he had acquired the cocaine several days before his arrest and had only used "a couple grams" by the time of his arrest. Tr. p. 176. Evidence was also presented that such restraint would be highly unusual if McGuire, in fact, possessed the cocaine merely to satisfy what he calls his "very bad cocaine habit" of

one to two ounces of cocaine use per week. *Id.* at 141, 176-77. McGuire's argument on appeal that he did not intend to deliver the cocaine is simply a request that we reweigh the evidence, which we cannot do. The evidence is sufficient to prove McGuire's intent to deliver cocaine.

Affirmed.

RILEY, J., and DARDEN, J., concur.